

**UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001**

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Before Commissioners: **Edward J. Gleiman, Chairman;**
 George A. Omas, Vice Chairman;
 Dana B. Covington; Ruth Y. Goldway;
 And W. H. "Trey" LeBlanc, III

In the Matter of:

Roanoke, WV 26423 :
(Robert J. Conley, Petitioner) :

Docket No. A2000-1

INITIAL BRIEF OF INTERVENOR OLIVER R. POSEY

Submitted by:

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Certificate of Service	Page 15
Affidavit of Robert J. Conley	unnumbered

CASES AND AUTHORITIES

CONSTITUTIONAL AMENDMENT CITED:

Fifth Amendment of the United States Constitution
(Page 9)

CODE CITED:

39 U.S.C. § 101(b)	(Page 9)
39 U.S.C. § 404(b)(1)	(Page 1)
39 U.S.C. § 404(b)(2)	(Page 12)
39 U.S.C. § 404(b)(5)	(Page 12, 13)

REGULATIONS CITED:

39 C.F.R. § 241.3(d)	(Page 9, 10)
39 C.F.R. § 241.3(f)	(Page 11)
39 C.F.R. § 241.3(g)	(Page 11,12)

CASES CITED:

Memphis Light, Gas & Water Division v. Craft, 98 S.Ct. 1554, 1562 (1978).
(Page 9)

Mullane v. Central Hanover Bank & Trust Co., 70 S.Ct. 652, 657 (U.S. 1950).
(Page 10)

Richardson v. Perales, 402 U.S. 389, 401 (1971).
(Page 13)

SUPPORTING DOCUMENTATION

The following documentation is necessary for reference due to the failure of the post office to file an administrative record.

FILED BY POSTAL SERVICE

Motion to Dismiss Proceedings

Exhibit 1 -- one page Postal Bulletin 21984

Exhibit 2 -- one page cover sheet of Final Determination to Close

Exhibit 3 -- one page cover sheet of Revised Proposal to Close

Exhibit 4 -- Participant Statement

FILED BY INTERVENOR

Intervenor's Response to Motion to Dismiss

Exhibit I-1 -- Affidavit of Oliver R. Posey

Exhibit I-2 -- Affidavit of Robert J. Conley

FILED BY PETITIONER

Participant Statement

INTERVENOR'S STATEMENT OF THE CASE

A proposal to close the Roanoke, West Virginia Post Office was allegedly posted on July 7, 1997. A Final Determination to close the post office was allegedly posted on March 4, 1998. The people served by the Roanoke Post Office did not receive proper notice of the proposal or the final determination. Robert J. Conley (petitioner) filed an appeal of that Final Determination with the Postal Rate Commission (Commission) on or about April 21, 2000. The Commission accepted the appeal by order issued on May 10, 2000. The Commission ordered the Postal Service to file the administrative record in the matter by May 25, 2000 and established a procedural schedule. On or about May 16, 2000, the Postal Service filed a Motion to Dismiss Proceedings. The motion was accompanied by a limited administrative record consisting of a one page copy of Postal Bulletin 21984 (November 5, 1998), labeled as Exhibit 1; a one page cover sheet of the final determination to close the post office, labeled as Exhibit 2; and a one page cover sheet of the revised proposal to close the post office, labeled as Exhibit 3. No supporting affidavits or sworn statements accompanied the motion. The petitioner was not served with the motion in person nor did he receive service by way of the U.S. Mail. On June 2, 2000, intervenor Oliver R. Posey (intervenor) filed his Notice of Intervention with the Commission and his response to the Postal Service's Motion to Dismiss. In support of his response, the intervenor submitted his affidavit, labeled as Exhibit I-1. As of June 13, 2000, neither the petitioner nor the intervenor have received notice that the administrative record in this matter has been filed with the Commission. The petitioner executed an affidavit on June 13, 2000, labeled as Exhibit I-2 and attached, re-stating his opposition to the closure and verifying the lack of service upon him of the Motion to

Dismiss and the lack of notice that the administrative record had been filed. Because proper notice was not given regarding the proposed closing or the final determination, the due process rights of the intervenor and other persons served by the Roanoke Post Office were violated. Furthermore, the lack of an administrative record precludes a finding that the final determination of the Postal Service was supported by substantial evidence. Therefore, this matter should be remanded to the Postal Service for further consideration.

**INTERVENOR'S POSITION
AS TO THE MERITS OF THE FINAL DETERMINATION**

The Postal Service alleges that a proposal to close the Roanoke, West Virginia Post Office was posted at the Walkersville/Crawford Post Office from July 7, 1997 to September 19, 1997. The Postal Service states that no comments were received and alleges that a Final Determination to close the post office was posted at the Walkersville/Crawford Post Office from March 4, 1998 to April 6, 1998. The Postal Service states that no appeal was filed within the 30 day period following the posting of the Final Determination. The intervenor has no reason to dispute the Postal Service's position that no comments were made in regards to the proposed closure. However, the intervenor contends that the reason no comments were made on the proposed closing was that the people served by the Roanoke Post Office did not receive proper notice of the proposal as mandated by constitutional amendment, statute, regulation, and case law. Therefore, the intervenor was denied his right to present his views on the proposed closure. The intervenor further contends that the Postal Service failed to consider the proper factors in closing the Post Office. However, there is no evidence to show what factors the Postal Service considered in reaching its final determination because the Postal Service failed to file the administrative record in this matter, despite the express order of the Commission to do so. The intervenor also contends that proper notice was not given of the final determination of the Postal Service to close the Roanoke Post Office so the time limits for appealing the final determination did not begin to run. Therefore, the matter should be remanded to the Postal Service for

reconsideration upon the proper factors and after proper notice has been given to the affected parties.

DISCUSSION

NOTICE OF PROPOSED CLOSURE

The intervenor contends that he did not receive proper notice of the proposed closure of the Roanoke Post Office. The Fifth Amendment of the United States Constitution guarantees all citizens due process of law. The Due Process Clause mandates that notice is proper only if it informs the affected parties of the action to be taken against them and it informs those parties of the procedures available for challenging that action.¹ The Postal Service failed to meet the proper notice requirements.

The Postal Service has alleged that, in 1997, it proposed to close the Roanoke, West Virginia Post Office. To effectuate the closure, the Postal Service must comply with certain procedural and substantive requirements. The constitutional principle of the Fifth Amendment is codified at 39 U.S.C. § 404(b)(1) which provides that the Postal Service "...shall provide adequate notice of its intention to close or consolidate such post office at least 60 days prior to the proposed date of such closing or consolidation to persons served by such post office to ensure that such persons will have an opportunity to present their views." Regulations promulgated as a result of this statute specify that the proposal to close the post office and an invitation for comments shall be posted prominently **in the affected post office.**² (emphasis added). In its prior Motion to Dismiss, the Postal Service has, in effect, conceded that it did not comply with the regulations. The Postal Service contends that it posted the notice in the Walkersville/Crawford Post Office, the post office providing alternative service for the

¹ *Memphis Light, Gas & Water Division v. Craft*, 98 S.Ct. 1554, 1562 (1978).

² 39 C.F.R. § 241.3(d)(1).

Roanoke Post Office. Because the regulations make no express provision for posting the notice in the post office providing alternative service, the Postal Service must take any other steps necessary to inform the affected public of the nature of the proposed action.³

The Postal Service cannot establish, based only on its submission of a cover sheet from the proposal to close the post office, that notice was provided to the people served by the Roanoke Post Office. In *Mullane v. Central Hanover Bank & Trust Co.*, the United States Supreme Court stated, “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁴ The “efforts” of the Postal Service to provide notice to the affected people fell well short of this requirement. The petitioner contends that there was no notice of the proposed closing in the local newspaper and no notice in the patrons’ mailboxes.⁵ Indeed, if the number of people actually affected by the closure is as small as the Postal Service alludes to in its Motion to Dismiss⁶, then actual written notice to the individuals served by the Roanoke Post Office appears to be the necessary and reasonable way of noticing these people whose post office had been temporarily suspended.

The Walkersville/Crawford Post Office is located near Walkersville, West Virginia. The Postal Service has alleged that Walkersville, West Virginia is “the nearest

³ 39 C.F.R. § 241.3(d)(3).

⁴ *Mullane v. Central Hanover Bank & Trust Co.*, 70 S.Ct. 652, 657 (U.S. 1950).

⁵ Participant’s Statement.

⁶ Motion to Dismiss.

large community” to Roanoke.⁷ The Postal Service conspicuously failed to note that Walkersville is a small town that is not near an interstate or commerce center.⁸ The Postal Service also failed to point out that Roanoke is about the same distance from Walkersville as it is from Weston – the commerce center of the area.⁹ Accordingly, there is no reasonable basis for assuming that posting a notice in the Walkersville/Crawford Post Office would notice those people served by the Roanoke Post Office of the planned closure.

Even if the Walkersville/Crawford Post Office was found to be the proper location to post the notice, the Postal Service has failed to show that the notice was posted prominently or that it provided the required information. The Postal Service simply filed the cover sheet from the alleged proposal posting.¹⁰ There was no affidavit to show the manner or location in which the notice was posted. Also absent was any indication that the notice was accompanied by the necessary invitation to comment.

NOTICE OF FINAL DETERMINATION

As was the case with the notice of the proposed action, the Postal Service failed to comply with its mandatory duty to provide proper notice of its Final Determination. The Postal Service must post a copy of the Final Determination prominently in the affected post office.¹¹ The Final Determination must include a notice of appeal rights.¹² The Final Determination was allegedly posted in the Walkersville/Crawford Post Office¹³

⁷ Motion to Dismiss.

⁸ Exhibit I-1.

⁹ Id.

¹⁰ Exhibit 3.

¹¹ 39 C.F.R. § 241.3(g)(1)(i).

¹² 39 C.F.R. § 241.3(f)(2)

¹³ Motion to Dismiss.

rather than the affected post office, there is no affidavit or supporting documentation to establish the manner or location in which the notice was posted, there is no evidence showing that the required contents of the notice were posted, and there is no evidence to establish that the Postal Service took the steps necessary to insure that the people served by the Roanoke Post Office were aware of the action proposed by the Postal Service. Therefore, notice of the Final Determination was not proper.

The time for filing an appeal of a final determination runs thirty (30) days after the proper notice of the Final Determination.¹⁴ The post office cannot be discontinued any less than sixty (60) days after proper notice has been given.¹⁵ Because proper notice was not provided, the time for filing an appeal did not begin to run, and implementation of the closure was improper.

BASIS FOR FINAL DETERMINATION

In making a determination whether or not to close a post office, the Postal Service must consider four specific (4) factors which include the effect on the community served by the post office and whether the closure is consistent with the policy, set forth in 39 U.S.C. § 101(b), of providing a high level of postal service to rural patrons.¹⁶ Nothing in that limited part of the administrative record that has been filed by the Postal Service in this matter addresses these factors. A determination of the Postal Service to close a post office must be based on substantial evidence.¹⁷ Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a

¹⁴ 39 U.S.C § 404(b)(5).

¹⁵ 39 C.F.R. § 241.3(g)(2).

¹⁶ 39 U.S.C § 404(b)(2)(A).

¹⁷ 39 U.S.C § 404(b)(5)(C).

reasonable mind might accept as adequate to support a conclusion.”¹⁸ Because there has, for all practical purposes, been no record filed by the Postal Service, there is no substantial evidence before this Commission in which to support a closure of the post office.

Similarly, the postal statute requires that the final determination of the Postal Service be neither arbitrary nor capricious.¹⁹ The Postal Service implies that the dam project depleted the community in the early 1980s.²⁰ Unfortunately, the Postal Service ignored the fact that the revised proposal to close the post office was proposed in 1997, not in the early 1980s and the area has seen significant commercial and residential growth as a result of the dam project.²¹ Because no administrative record has been filed, it is impossible to determine if this growth was considered or what other specific factors the Postal Service based its determination on. However, it is clear that the Postal Service did not take the steps necessary to inform the affected people of its planned actions, so no input was received from those people. Any final determination made without the input of the affected people, in light of the lack of proper notice, would obviously be arbitrary and capricious.

¹⁸ *Richardson v. Perales*, 402 U.S. 389, 401 (1971)

¹⁹ 39 U.S.C § 404(b)(5)(A).

²⁰ Motion to Dismiss.

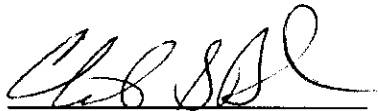
²¹ Exhibit I-1.

PROPOSED HOLDING

The final determination of the Postal Service to close the Roanoke, West Virginia Post Office is arbitrary, capricious and otherwise not in accordance with the law; the final determination was made without observance of the procedure required by law; and the final determination is not supported by substantial evidence in the record. Therefore, the matter should be returned to the Postal Service for further consideration. Furthermore, the final determination of the Postal Service should be suspended pending the final disposition of the appeal.

Respectfully submitted,

OLIVER R. POSEY
Intervenor
By counsel



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with Section 12 of the Rules of Practice, specifically by mailing true copies to the U.S. Postal Service and to Robert J. Conley, Petitioner, by depositing same in the U. S. Mail, postage paid, on the 13th day of June, 2000.



Clinton G. Bush, Esquire

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners: Edward J. Gleiman, Chairman;
George A. Omas, Vice Chairman;
Dana B. Covington; Ruth Y. Goldway;
And W. H. "Trey" LeBlanc, III

In the Matter of:

Roanoke, WV 26423 : Docket No. A2000-1
(Robert J. Conley, Petitioner) :

AFFIDAVIT

STATE OF WEST VIRGINIA,
COUNTY OF LEWIS, TO WIT:

Robert J. Conley, the affiant, having first been duly sworn avers and says:

- 1) That my name is Robert J. Conley;
- 2) That I am a County Commissioner in Lewis County, West Virginia – the county in which Roanoke, West Virginia is located;
- 3) That I am the petitioner in the above-referenced claim;
- 4) That I have now been advised by a concerned citizen of Lewis County that the U.S. Postal Service has filed a Motion to Dismiss in this claim;
- 5) That the Motion to Dismiss by the U.S. Postal Service was not served upon me personally nor did I receive service by the United States mail;
- 6) That I continue to object to the closure of the Roanoke, West Virginia Post Office as I do not believe the U.S. Postal Service complied with the notice requirements or other procedural and substantive requirements of the relevant regulations;

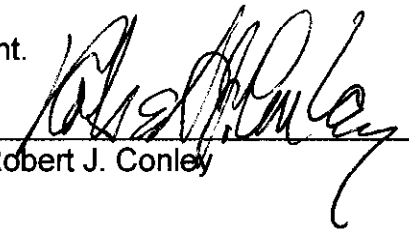
7) That, upon information and belief, the Postal Rate Commission ordered the U.S. Postal Service to file the administrative record in this matter by May 25, 2000;

8) That as of this the 13th day of June, 2000, I have not received notice that the administrative record has been filed by the U.S. Postal Service;

9) That I have been advised that intervenor Oliver R. Posey, desires to join as a petitioner in this matter;

10) That I have no objection to Oliver R. Posey being joined as a petitioner in this matter as he is a resident of the area served or formerly served by the Roanoke, West Virginia Post Office and we both oppose the closure of that Post Office; and

11) That further the Affiant sayeth naught.

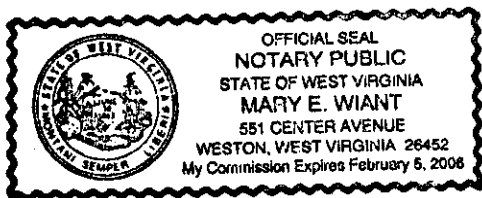


Robert J. Conley

STATE OF WEST VIRGINIA
COUNTY OF LEWIS, TO WIT:

Taken, subscribed and sworn to before me this the 13th day of June, 2000, by Robert J. Conley.

My Commission expires: Feb 5, 2006





NOTARY PUBLIC